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IN THE

Supreme Court of the United States

October Term, 1955

No. ~~548~~ 16

ALFRED E. BUTLER,

Appellant,

—against—

STATE OF MICHIGAN,

Appellee.

BRIEF OF THE AUTHORS LEAGUE OF AMERICA, INC., AS *AMICUS CURIAE*

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TABLE OF CONTENTS

	PAGE
INTEREST OF THE AUTHORS LEAGUE AS AMICUS CURIAE	1
ARGUMENT—	
I. Probable jurisdiction should be noted because the statute is unconstitutional and because the application of different tests of obscenity has produced variances in protection of the right of freedom of the press	2
II. The statute should be declared unconstitutional because it improperly enlarges the area of writings excluded from protection under the First and Fourteenth Amendments, and is so vague and indefinite as to permit punishment of writings fairly within the protection of these Amendments	4
A. The prohibition of books "containing" obscene language is unreasonable	4
B. Prohibitions phrased in terms of "minors" and "youth" are unreasonable	9
C. The language of the statute is also so vague and indefinite that no bookseller or distributor could possibly know when he might be held to have ignored its prohibitions; on this ground as well, it is unconstitutional	10
CONCLUSION	12
EXHIBIT A	13

Authorities Cited

Cases

	PAGE
Besig v. United States, 208 F. 2d 142	3, 4, 5, 6, 7
Bantam Books v. Melko, 25 N. J. Super. 292	8
Board of Education v. Barnette, 319 U. S. 624	7
Chaplinsky v. New Hampshire, 315 U. S. 568	6
Commonwealth v. Gordon, et al. 66 D & C Reports (Pa.) 101	8-9, 11
Halsey v. New York Soc. for Suppression of Vice, 234 N. Y. 1	6, 7
Hannigan v. Esquire, 327 U. S. 146	7
State v. Lerner, 81 N. E. 2d 282	5
United States v. One Book Entitled Ulysses, 72 F. 2d 705	2, 5, 6, 7, 8, 9
Winters v. United States, 333 U. S. 507	10

Statutes

Sec. 141 Penal Code (Sec. 28.336, Mich. Stat. Ann.)	10
Sec. 339 Penal Code (Sec. 28.571, Mich. Stat. Ann.)	10
Sec. 145-a Penal Code (Sec. 28.341, Mich. Stat. Ann.)	10
28.575 Mich. Stat. Ann.	1

Miscellaneous

Report of the Select Committe on Current Pornographic Material, HR 2510, 82nd Congress, 2nd Session	9

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Interest of the Authors League as *Amicus Curiae*

The Authors League of America, Inc., a New York membership corporation, submits this brief as *amicus curiae* to urge respectfully that probable jurisdiction be noted; and that when this cause is considered on the merits the statute involved (28.575 Mich. Stat. Ann.) be declared unconstitutional.

The membership of The Authors League of America, Inc. consists of more than four thousand professional authors and playwrights residing throughout the United States, including many of the Nation's eminent literary figures.

Although statutes prohibiting "obscenity" and its galaxy of synonyms have their greatest impact on authors whose books are or may be proscribed, authors themselves have

no opportunity to directly assert or defend their Constitutional rights since prosecutions are invariably directed at booksellers or distributors. Therefore, one of the purposes of the Authors League is to express the views of writers on statutes restricting freedom of press; in keeping with that purpose (and with the consent of the parties) this brief is respectfully submitted to the Court.

ARGUMENT

I. Probable Jurisdiction Should Be Noted Because the Statute Is Unconstitutional and Because the Application of Different Tests of Obscenity Has Produced Variances in Protection of the Right of Freedom of the Press.

It is respectfully submitted that probable jurisdiction should be noted because the statute in question, representative of similar measures now in effect in several States (Jurisdictional Statement p. 7), is unconstitutional for the reasons hereinafter discussed at page 4, *et seq.*

The Application of Different Tests of Obscenity Has Produced Variances in Protection of the Right of Freedom of the Press.

There are now two standards for determining if a work is to be denied constitutional protection on the ground of obscenity. One is the standard announced in *United States* v. *One Book Entitled Ulysses*, 72 F. 2d 705:

> "* * * whether the publication taken as a whole has a libidinous effect" (p. 707).

Under this test the Circuit Court determined that "Ulysses" was not "obscene" even though it found:

> "That numerous long passages in Ulysses contain matter that is obscene under any fair definition of the word * * *" (p. 706).

The second standard is that contained in the Michigan statute in question, and applied in opinions such as *Besig* v. *United States,* 208 F. 2d 142. The Court below declared that the statute was violated because of language which the book contained, and stated that the statute "does say that it is sufficient to contain lewd, immoral, obscene and lascivious language or description" (Jurisdictional Statement, p. 16).

Indeed, the Court was aware of the difference between the two approaches, stating that not only did the book violate the statute, but that "even viewing the book as a whole" the language was "not necessary" to the proper development of its theme.

In *Besig* v. *United States,* 208 F. 2d 142, the Court held that the word "obscene" is used as

> "the word symbol for indecent, smutty, lewd or salacious reference to parts of the human or animal body or to their functions * * *" (p. 145).

Unquestionably, the Circuit Court in *Besig* was not concerned with whether the challenged works "taken as a whole (had) a libidinous effect." As in the case of the Michigan statute, the Court was concerned rather with language and theme *per se* (judged by such nebulous criterion as delicacy of language) for it said:

> "Yet we risk the assertion that there is an underlying, perhaps universal, accord that there is a phase of respectable delicacy related to sex, and that those compositions which purposely flaunt such delicacy

> in language generally regarded as indecent come under the ban of the statute'' (p. 147).

Thus, on the one hand, protection under the First and Fourteenth Amendment is denied on the ground of ''obscenity'' only where a work is considered as a whole, has a libidinous effect. On the other hand, protection is denied on the ground of ''obscenity'' if passages contained in a work, in the words of the *Besig* opinion, deviate from ''the phase of respectable delicacy related to sex.''

Under these circumstances, freedom of the press expands and contracts as the same work passes from one State to another, and from the jurisdiction of one Federal or State Court to another. It is respectfully submitted that rights established under the First and Fourteenth Amendments should be afforded uniform protection throughout the United States and that the Court should declare the extent to which writings may be excluded from the protection of the First and Fourteenth Amendments.

II. The Statute Should Be Declared Unconstitutional Because It Improperly Enlarges the Area of Writings Excluded from Protection Under the First and Fourteenth Amendments, and Is So Vague and Indefinite as to Permit Punishment of Writings Fairly Within the Protection of These Amendments.

A. The Prohibition of Books "Containing" Obscene Language Is Unreasonable.

Statutes which prohibit any book ''containing'' obscene matter improperly infringe the protection of the First and Fourteenth Amendments. The constitutionality of such

statutes, including the one here involved, has not yet been tested by appellate courts, although a similar statute was declared unconstitutional in *State* v. *Lerner* (Court of Common Pleas of Ohio), 81 N. E. 2d 282. However, the rationale of the decision in *United States* v. *One Book Entitled Ulysses* demonstrates why the standard applied in the Michigan statute and in *United States* v. *Besig, supra* is so unreasonable as to be unconstitutional.

In *Ulysses,* the opinion conceded "that numerous long passages in Ulysses contain matter that is obscene under any fair definition of the word * * * " (p. 706). However, the Court refused to ban the book for that reason, because of the unlimited possibilities of suppression that would necessarily follow. Judge Hand said:

> "The erotic passages are submerged in the book as a whole and have little resultant effect. If these are to make the book subject to confiscation, by the same test Venus and Adonis, Hamlet, Romeo and Juliet, and the story told in the Eighth Book of the Odyssey by the bard Demodocus of how Ares and Aphrodite were entrapped in a net spread by the outraged Hephaestus amid the laughter of the immortal gods, as well as many other classics, would have to be suppressed. Indeed, it may be questioned whether the obscene passages in Romeo and Juliet were as necessary to the development of the play as those in the monologue of Mrs. Bloom are to the depiction of the latter's tortured soul.
>
> "It is unnecessary to add illustrations to show that, in the administration of statutes aimed at the suppression of immoral books, standard works of literature have not been barred merely because they contained *some* obscene passages, and that confiscation for such a reason would destroy much that is precious in order to benefit a few" (p. 707).

Similarly, the New York Court of Appeals, in *Halsey* v. *New York Soc. for Suppression of Vice,* 234 N. Y. 1, stated:

> "No work may be judged from a selection of such paragraphs alone. Printed by themselves they might, as a matter of law, come within the prohibition of the statute. So might a similar selection from Aristophanes or Chaucer or Boccaccio, or even from the Bible. The book, however, must be considered broadly, as a whole" (p. 47).

It is respectfully submitted that *United States* v. *One Book Entitled Ulysses, supra,* reasonably defines the class of speech which may be denied constitutional protection on the ground of "obscenity". The Michigan statute and decisions such as *United States* v. *Besig, supra,* unreasonably broaden the definition of that class by drawing it in terms of forbidden themes, indelicate language or treatment, and "offensiveness".

In *Ulysses* and in *Halsey* v. *New York Society for the Suppression of Vice, supra,* the courts found that there was "obscenity" in the sense that the term is used in *Besig* and in the Michigan statute—"obscenity" in the dictionary sense of the word. However, *Ulysses* and *Halsey* held that it was unreasonable and impractical to prohibit works on that basis and thus "exclude much of the great works of literature"; therefore "obscene", as the label for a class of writing which may properly be banned, was redefined to mean libidinous effect determinable only by considering a work as a whole.

When this Court, in *Chaplinsky* v. *New Hampshire,* 315 U. S. 568, 571, spoke of the "lewd and obscene" as one of the "well-defined and narrowly limited classes of speech"

which may be denied constitutional protection, did it mean "obscenity" in the sense of the *Ulysses* opinion or in the sense of the Michigan statute and opinions such as *Besig* v. *United States, supra*?

The only sense in which the term "obscenity" could reasonably be used to bound a "well-defined and narrowly limited class[es] of speech" is the sense established in *Ulysses* and *Halsey*. If "obscenity", as a ground for denying constitutional protection, is used in the sense of the Michigan statute and *Besig*, protection would be determined according to such vague standards as impropriety of subject matter or vagueness of language, and according to such nebulous criteria as the offensiveness of writings to the sensibilities of innumerable groups, religious, ethnic, geographic and economic.

Used in this latter sense "obscenity" as a standard would, in the words of Mr. Justice Frankfurter, touch "the very basis of a free society, that of the right of expression beyond the conventions of the day" (*Hannigan* v. *Esquire*, 327 U. S. 146, 160. In this context the statement of Mr. Justice Jackson in *Board of Education* v. *Barnette*, 319 U. S. 624, is apposite.

> "Nevertheless, we apply the limitations of the Constitution with no fear that freedom to be intellectually and spiritually diverse or even contrary will disintegrate the social organization. * * * We can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes. When they are so harmless to others or to the State as those we deal with here, the price is not too great. But freedom to differ is not lim-

> *ited to things that do not matter much.* That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order" (pp. 641-2).

It is respectfully urged that there is a particular need for affirming the rationale of *Ulysses* and on its basis setting aside the statute in question as unconstitutional. To do so would be to clarify the vagueness which is now inherent in the obscenity statute here involved and in others of which it is representative.

Vagueness in these statutes is dangerous because of the manner and area in which their coercive and restrictive influence operates. Invariably prosecutions are directed against booksellers or distributors who understandably do not have the incentive, as an author would, to challenge the applicability of the statute to a particular work. On the contrary, if there is any doubt about a book, and doubts are multiplied by statutory vagueness, the bookseller or distributor will simply abandon it. There is little loss involved in such a course, as contrasted with the risk of possible conviction and consequent loss of business for a cause in which the bookseller has no personal stake. Indeed, it is not uncommon for booksellers and distributors to resolve the issue against a particular book before there is even a threat of prosecution.

In recent years suppression has been increased by the efforts of local prosecuting attorneys and police authorities, operating under vague obscenity statutes and using the authority of their office, to compel booksellers and distributors to discontinue the sale of innumerable works. Cf. *Bantam Books* v. *Melko*, 25 N. J. Super. 292; *Common-*

wealth v. *Gordon, et al.*, 66 D & C Reports (Pa.) 101; *Report of the Select Committee on Current Pornographic Material,* HR 2510, 82nd Congress, 2nd Session; excerpts from testimony before this committee are set out in Exhibit A, hereto. The testimony indicates how the Detroit Police Department, using the statute here involved, has induced distributors and booksellers to "voluntarily" suppress innumerable books.

Judge Hand's fear, expressed in *Ulysses,* that wholesale suppression would result if books were banned on a standard broader than the libidinous effect of a work taken as a whole, has been unfortunately and all too frequently realized.

B. Prohibitions Phrased in Terms of "Minors" and "Youth" Are Unreasonable.

The statute in question also unreasonably restricts freedom of the press by denying to adults the right to possess, or to sell to other adults, books not found objectionable on any ground other than the effect they might "tend" to have on minors. We wonder whether the Legislature of Michigan would consider it reasonable to impose an absolute prohibition on the possession by adults (as well as children) of liquor, automobiles or firearms, on the theory that such instruments are unquestionably deleterious to the health and welfare of minors and therefore should be totally excluded from the State.

It is also unreasonable that "Romeo and Juliet" or "Hamlet" (which Judge Hand in *Ulysses* found to contain concededly "obscene" passages) should be denied to students 16 or 17 years of age. The unreasonableness of

such a classification is borne out by other provisions of the Michigan Penal Code.

For example, Section 339 of the Penal Code (Sec. 28.571, Mich. Stat. Ann.) makes it a crime for a female to debauch the morals of any boy under the age of 15 by seducing him; presumably once boys reach 15 years of age their morals can no longer be impaired by seduction, but can be by books containing obscene language!

Section 145-a of the Penal Code (Sec. 28.341, Mich. Stat. Ann.) makes it a crime to solicit a child under 16 years of age with intent to induce it to commit an immoral act; presumably children 16 years of age and older have developed resistance to such solicitation, but not to obscene or lewd language in a book.

Finally, Section 141 of the Penal Code (Sec. 28.336, Mich. Stat. Ann.) provides that no minor child under the age of 17 is permitted to enter a house of prostitution. Apparently, the Michigan Legislature has found that at 17 boys are qualified to visit such establishments, but not to read books containing obscene or lewd language!

C. The Language of the Statute Is Also So Vague and Indefinite That No Bookseller or Distributor Could Possibly Know When He Might Be Held to Have Ignored Its Prohibitions; On This Ground As Well, It Is Unconstitutional. (*Winters* v. *United States*, 333 U. S. 507, 519.)

The statute contains two qualifying clauses: (i) "tending to incite minors to violent or depraved or immoral acts", and (ii) "manifestly tending to the corruption of

the morals of youth." It is not clear whether the first of these clauses modifies all of the language which precedes it, or only the clause "or obscene, immoral, lewd or lascivious prints, pictures, figures or descriptions."

Confusion is compounded by the use of the second modifying phrase—it is not clear what portion of the preceding language this is intended to modify. Presumably, the statute could prohibit, among other things, "obscene descriptions," which tend to incite "minors" to immoral acts, which manifestly tend to the corruption of the morals of youth. (Does this imply that there are immoral acts which do not manifestly tend to corrupt the morals of youth?)

No bookseller could determine whether passages of a book were "tending to incite minors to immoral acts, manifestly tending to the corruption of the morals of youth."

It is further submitted that the statute is too vague and indefinite in phrasing its prohibitions in terms of "tendencies". In *Commonwealth* v. *Gordon*, 66 D. & C. Rep. 101, Judge Bok said (p. 156):

> "The opinion of anyone that a tendency thereto exists or that such a result is self-evident is insufficient and irrelevant. The causal connection between the book and the criminal behavior must appear beyond a reasonable doubt."

That observation is even more pertinent to the vaguely worded double "tendency" clause of this statute.

CONCLUSION

We respectfully urge that the Court note probable jurisdiction, and declare the Michigan statute unconstitutional.

Respectfully submitted,

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EXHIBIT A

Excerpts from the testimony of Inspector Herbert W. Case of the Police Department, Detroit, Michigan, before The Select Committee on Current Pornographic Materials, 82nd Congress, 2nd Session, H. R. 2510.

Mr. Case. We operate under the State law, insofar as the literature is concerned; that is, the books, periodicals, magazines, and so forth, pictures, and primarily we use section 343* in its entirety for that purpose. (50)

* * * * *

A literary censor bureau was established in the Detroit Police Department in 1937. This group was absorbed by the detective bureau in 1941, and in 1948, a separate group was created to handle the problem. (51)

* * * * *

We then informed the distributor, that is, the wholesaler, who, in turn, notified the publisher, that they were in violation of our State statute, that they would have to be withheld from circulation, or they could be defended in court, as the case may be, in a test case, and such a test case had. The result was that they were withheld. (51)

* * * * *

Mr. Burton. Later was this approach on the part of the Detroit distributors extended to any other materials?

Mr. Case. Yes.

Mr. Burton. Such as magazines and pocket-size books?

Mr. Case. Yes, it was; and it is still being done.

The pocket-size magazine, the pocket-size book, didn't carry too much of a problem with us until subsequent to the comic problem.

Mr. Burton. About what date was that, Inspector?

Mr. Case. The great amount of complaints started coming in to us on the pocket-size books the latter part of—

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* Section 343 is the statute challenged in this proceeding.

well, I would say—1950, at the beginning of 1950, and they gradually grew in amount until 1951 it was necessary that we start screening these and, of course, I should mention the fact that we catalog, started cataloging, these books in a certain manner, and with a cross-index filing system on the excerpts, and the cards.

Now, in 1951 we called in—we have two distributors in Detroit. We called in the one independent distributor—the other is the American News Co.—and on one we had voluntary cooperation which, naturally, is the ideal method of suppression of this type of material, and the other was forced.

We called them in, and we threatened prosecution in one instance, in view of the fact that we could not very well say to the one who is cooperating that he could put it out, and the other one can't. We had them in a conference with the Wayne County prosecuting attorney's office, and there they voluntarily agreed to submit to us for inspection the pocket-size magazines before distribution.

It became necessary that we undertake a terrific job to screen those things with a very small staff of men. Now, it is far from being foolproof. We do screen them through, in what we call skimming off the filth, so to speak, at the top, with the result that we have books placed in three categories: One, which have been approved, read by us and approved, with the name of the distributor, the name of the author, and the date submitted for distribution in the city.

Then we have one which is partially objectionable, that is, one which we might object to in part or maybe a paragraph or a certain portion of that may technically fall within the meaning of our Michigan State statute, but is not one that we feel would be a good case to present to court.

The other is one that we definitely feel is a violation of

the law, and we have a letter back from the prosecuting attorney, after he examines the excerpts that we submit.

He sends us back a letter in writing, stating that it is obscene within the meaning of the Michigan State statute. (52)

• • • • •

Mr. Case. We have not to date, sir, lost a case in court. We have had no instances up to the present time, as far as the pocket-size books are concerned, as having gone into court. *They have always been withdrawn voluntarily.* (Emphasis supplied.)

In fact, we rather—I don't like to go to court except as a last resort because usually the title is exploited, and it is given impetus toward sales in a great many parts of the country. (53)

• • • • •

Mr. Burton. I would like to ask if these are some of the tests: One, excessive profanity or lewd and lascivious language; (2), the detailed description of erotic experiences; (3), the detailed description of objectionable practices, such as dope addiction, abortion, and so forth; and (4), general continuity and tenor of the story, if it be lewd?

Mr. Case. Yes. All of those things definitely enter into the problem of obscenity.

I think that that would all be brought out very definitely by the statute. Perhaps it might be well if I read it. It would definitely answer that one question in point. It is lewd or lascivious language and, of course, there is one very important phrase in that section which says "or tends to corrupt the morals of youth." (53-54)

• • • • •

Mr. Case. As I mentioned, we have two distributors in Detroit. One is an independent, and one is part of a national organization, the American Magazine Co.

Mr. Burton. You mean the American News?

Mr. Case. Yes; the American News Co.

We usually find that the distributor of the community is a man of good repute in his community, a family man. If he has children, they usually go to school there, and we *appeal to the distributor from that standpoint, and the result has been very gratifying to us because we feel that voluntary censorship on his part is the ideal method of suppression.* If we can keep that thing out of circulation and it doesn't hit the streets, why, we are accomplishing a lot more than attempting to do something about it after it has gained its objective of being circulated. (Emphasis supplied.) (54-55)

* * * * *

There have been times when various wholesalers, both in the State of Michigan and outside have asked for the list of books and magazines that we have withheld, but I do not supply them with that.

There is a very good reason for it. I will supply any law-enforcing officer, or any prosecuting attorney, but I do not intend to supply these people with these lists, outside of those people. If they want to get them, I advise them to go to the prosecuting attorney or chief law-enforcing officer in their respective area, and I will be only too happy to furnish them to him. (61)

* * * * *